In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 603

CONTINENTAL NUT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. In September 1966, petitioner Company and the Union[1] executed an Agreement for Consent Election. The Agreement provided for the holding of a representation election under the supervision of the Board's Regional Director among a specified group of the Company's employees. It further provided that "the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election," and that the

[1] Warehousemen's Union Local 17, Int'l Longshoremen and Warehousemen's Union.

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"method of investigation of objections and challenges, including the question whether a hearing shall be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding". (Pet. App. ii–iii, xxxii.)

The Union won the election 90 to 73, with 2 ballots challenged. The Company filed an objection to the election, contending that the Union had affected employee free choice by promising numerous employees that initiation fees would be waived if the Union won the election. The Regional Director, after investigation, overruled the objection; he found that the Union's promises were not objectionable because the employees understood that any reduction in the initiation fee would apply to all employees who joined the Union, regardless of how any individual employee voted in the election.[2] The Regional Director accordingly certified the Union as the employees' bargaining representative. (Pet. App. iii–iv, xi–xiii.)

The Company, contending that the certification was invalid, refused to bargain with the Union, and an unfair labor practice complaint issued. The Board, noting that the Company had agreed to be bound by the Regional Director's findings and conclusions on objections to the election, held, in accordance with its customary practice respecting such agreements, that it would not consider the merits of the Regional Director's ruling on the objection, but only whether his action was arbitrary or capricious. Finding that the

[2] See *National Labor Relations Board* v. *Gafner Automotive & Machine, Inc.* No. 17486 (C.A. 6), August 16, 1968, 69 LRRM 2902.

Company had not established the latter, the Board concluded that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (Pet. App. xiii, xv–xvi.) The Board ordered the Company to cease and desist from its unfair labor practices, and to bargain, on request, with the Union (Pet. App. xvii–xix).

The court of appeals agreed that the only issue open to review was whether the Regional Director's action was arbitrary or capricious, and that no such showing had been made. Accordingly, it enforced the Board's order. (Pet. App. i–viii.)

2. The sole question presented is whether the court below applied an erroneous standard in holding that, in the circumstances of this case, the only issue open to review was whether the Regional Director had acted arbitrarily or capriciously in overruling the Company's objection to the election. As petitioner recognizes (Pet. 8, n. 9), the parties to an election can waive or limit their right to judicial review. Moreover, as petitioner further recognizes (Pet. 10, n. 10), the courts have consistently interpreted the finality language of the type of consent agreement utilized here as manifesting the parties' intent to permit the Regional Director to make a final and conclusive determination of all issues in the representation proceeding, and to subject his determination to review by the Board and the courts only to the extent of insuring that he was not arbitrary or capricious.[3]

[3] This interpretation of the consent election agreement is not inconsistent with the statements in the Board's rules and regulations respecting the difference between that type of agreement and a Stipulation for Certification upon Consent Election (Pet.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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6–8). The rules and regulations merely point out that, in the case of the latter, the Board, rather than the Regional Director, determines questions concerning eligibility, challenged votes, and objections to the conduct of the election; they do not concern themselves with the other differences between the two types of agreements, since it is provided that copies may be obtained from the Board's Regional Offices (Pet. App. xxvi). A comparison of the agreements themselves reveals that the consent agreement provides that the "method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding" (Consent Agreement, par. 6; Pet. App. xxxii). On the other hand, the stipulation provides that "All procedure subsequent to the conclusion of counting ballots shall be in conformity with the Board's Rules and Regulations" (Stip., par. 6; Pet. App. xxxii)—the procedure followed even in non-consent cases. This difference between the two agreements justifies a difference in the scope of administrative and judicial review available under each agreement.

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